No. 710

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE ALASKA UNITED GOLD MINING COMPANY,
Plaintiff in Error,

vs.

HENRY MUSSET, AS ADMINISTRATOR OF THE ESTATE OF EDWARD HEGMAN, DECEASED,
Defendant in Error.

Motions to Dismiss and Affirm and to Vacate Supersedeas and Brief Thereon.
and
Brief for Defendant in Error on the Merits.

LORENZO S. B. SAWYER,
Counsel for Defendant in Error.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ALASKA UNITED GOLD MINING COMPANY,
Plaintiff in Error,
vs.
HENRY MUSSET, as Administrator of the Estate of Edward Hegman, Deceased,
Defendant in Error.
No. 710.

On Error to the United States District Court for Alaska, Division No. 1.

Motions to Dismiss and Affirm, and Motion to Vacate Supersedeas.

Comes now the defendant in error, by his counsel, and moves the Court to dismiss the writ of error herein upon the following grounds:

1. The bill of exceptions herein was not settled, approved, signed, or filed in time.

2. The Court below had no jurisdiction to order the bill of exceptions herein filed *nunc pro tunc* as of a previous day and term, or to order it made a part of the record in the case.

3. The writ of error and the citation in this case were made returnable more than thirty days from the day of signing the citation and at different days, and neither the writ nor the citation were annexed to and returned with the record.

4. No assignment of errors was filed with the clerk of the court below with the petition for the writ of error.

And said defendant in error, by his counsel, also moves the Court to affirm the judgment of the Court below with damages at a rate not exceeding ten per cent, in addition to interest upon the amount of the judgment, on the ground that although the record may show that this Court has jurisdiction, it is manifest the writ was taken for delay only, and that the grounds thereof are frivolous.

And said defendant in error, by his counsel, also moves the Court to vacate the order of the Judge of the lower court staying execution of the judgment herein and the so-called supersedeas bond herein, upon the following grounds:

1. The said order was conditioned upon the giving of a bond which was not *thereafter* given. (Record, 25.)

2. The only bond given is void and of no effect because *given* before the allowance, issue, or filing of the writ of error, or the signing of a citation on said writ. (Record, 30, 25, 2, 3, 4.)

These motions to dismiss and affirm and to vacate supersedeas are preliminary motions which the Court may see fit to decide before it takes up the cause upon its merits. Their object is, if possible, to expedite and speed the cause. The Court may not find it necessary to go into the merits of the case. These motions are made upon the record on file herein, and plaintiff in error and his counsel are hereby notified that these motions will be argued and submitted when the case comes on for hearing before this Court.

L. S. B. SAWYER,
Counsel for Defendant in Error.

To Plaintiff in Error and MALONY & COBB, and JOHN FLOURNOY, Esqs., His Counsel.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ALASKA UNITED GOLD MINING COMPANY,
Plaintiff in Error,
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Defendant in Error.
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On Error to the United States District Court for Alaska, Division No. 1.

Brief on Motions.

MOTION TO DISMISS WRIT OF ERROR.

We will take up these several motions and go over their respective grounds seriatim briefly.

1. Because the bill of exceptions was not settled, approved, signed, or filed in time.

The judgment herein was rendered and entered on March 16, 1901, in the December, 1900, term of the Court. (Record, 22; rule 3, par. 2, of said Court.) On the same day a motion for a new trial was denied, and the defendant was allowed forty days in which to reduce his exceptions to writing and present the same for allowance and settlement by the Court. (Record, 107, 108.) But said bill of exceptions was not approved or signed until

May 7, 1901, or filed until May 8, 1901 (Record, 110), after the term in which judgment was entered had expired (the December, 1900, term of the Court expired on the 30th day of March, 1901, Rule 3, par. 2), and twelve and thirteen days, respectively, after the time granted had expired and no further extension of time to file said bill was ever applied for or granted.

"When a bill of exceptions is presented to and signed by the Judge after the close of the term, and the record fails to disclose any order extending the time for its presentation, or any consent of parties thereto or any standing rule of Court authorizing such approval, the Supreme Court will affirm the judgment."

Syll. U. S. v. Jones, 149 U. S. 262.

The concluding sentences of the decision are:

"The bill of exceptions was therefore improvidently allowed. (Muller v. Ehlers, 91 U. S. 249; Jones v. Sewing Machine Co., 131 U. S. Append. c. 1; Bank v. Eldred, 143 U. S. 293.) As the errors assigned arise upon the bill of exceptions, we are compelled to affirm the judgment; and it is so ordered."

In Muller v. Ehlers, supra, says the Court: "But it does not appear that the bill of exceptions was filed, signed, tendered for signature, or even prepared before the adjournment of the court for the term at which the judgment was rendered. No notice was given to the plaintiff of any intention on the part of the defendants to ask for the allowance of a bill of exceptions either during the term or after. No application was made to the Court for

an extension of time for that purpose. No such extension of time was granted and no consent given. Upon the adjournment for the term the parties were *out of court*, and the litigation there was at an end. The plaintiff was discharged from further attendance; and all proceedings thereafter, in his absence and without his consent, were *coram non judice*. The order of the Court, therefore, made at the next term, directing that the bill of exceptions be filed in the cause as of the date of the trial, was a *nullity*. For this reason, upon the case as it is presented to us, the bill of exceptions, though returned here, cannot be considered as part of the record." The Court then distinguishes the case of U. S. v. Breitling, 20 How. 253, and says: "That case went to the extreme verge of the law upon this question of practice, and we are not inclined to extend its operation. It was said by this Court in Generes v. Bonnemer, 7 Wall. 565, that 'to permit the Judge to make a statement of the facts on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or *even after it is issued*, would place the rights of parties who have judgments of record entirely in the power of the Judge, without hearing and without remedy.' This language is substantially adopted in Flanders v. Tweed, 9 Wall. 425, where it was said: 'The statement of facts by the Judge is filed upon the 29th May, 1868, nearly three months after the rendition of the judgment. This is an irregularity, for which this Court is bound to disregard it, and to treat it as *no part of the record.*' As early as Walton v. U. S., 9 Wheat. 651, the power to reduce exceptions taken at the trial to form and to have them signed and filed, was, under ordi-

nary circumstances, confined to a time not later than the *term at which the judgment was rendered.* This, we think, is the *true rule,* and one to which there should be no exceptions without an express order of the Court, during the term or consent of the parties, save under very extraordinary circumstances. Here we find no order of the Court, no consent of the parties, and no such circumstances as will justify a departure from the rule. A judge cannot act judicially upon the rights of parties after the parties in due course of proceeding have both in law and in fact been dismissed from the court."

In Bank v. Eldred, supra, says the Court:

"By the uniform course of decision no exceptions to rulings at a trial can be considered by this Court unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the Judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of Court, or by consent of parties; and save under *very extraordinary circumstances, they must be allowed by the Judge and filed with the clerk during the same term.* After the term has expired, without the Court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the Court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed is at an end," citing cases.

See, also, Miller v. Morgan, 14 C. C. A. 312, and the case of Minor v. Tillotson, 2 How. 392, which holds that the Supreme Court will not revise on writ of error,

where there is no bill of exceptions, though the whole of the evidence appears in the record.

What's the difference between a bill of exceptions *improvidently filed* that *cannot be considered,* and no bill of exceptions? The decision in Minor v. Tillotson, supra, concludes: "A judgment of affirmance is therefore entered at the costs of the plaintiff in error."

Cases in the United States Circuit Courts of Appeals to the same tenor and effect are too numerous to cite. Here follow a few of them: R. Co. v. Hyde, 5 C. C. A. 461; U. S. v. Carr, 10 C. C. A. 80. The Court has no power to enlarge the time fixed by the order of the Court entered during the term. A bill of exceptions so allowed is no part of the record and cannot be considered on writ of error. (Ry. Co. v. Russell, 9 C. C. A. 108, citing other cases.) No bill of exceptions was * * * signed by trial Judge during the term at which trial was had and judgment rendered, nor within any extension for that purpose, either by order or by consent of counsel, etc. The certificate of the Judge is unavailing. (R. & D. R. Co. v. McGee, 2 C. C. A. 81.) Now, therefore, unless the mere presentation of a proposed bill of exceptions is more important than the settlement, approval, signing, or filing thereof, or unless the circumstances of this case were *so extraordinary* as to justify such a departure from proper practice, this bill of exceptions was filed too late to be considered, and, in the language of one of the Supreme Court cases cited, "as the errors assigned arise upon the bill of exceptions," this Court will be "compelled to affirm the judgment."

The next ground of dismissal of the writ of error herein—

2. The Court below had no jurisdiction to order the bill of exceptions herein filed *nunc pro tunc* as of a previous day and term, or to order it made a part of the record in the case—is abundantly supported by the authority of the case, Muller v. Ehlers, already cited. The bill of exceptions was not settled, approved, signed, or filed, either during the term at which the judgment was entered, or during the time thereafter granted, and no further extension of time to file said bill was ever granted or applied for. The case had been removed to this court by not only the issue, but by the filing and service of a writ of error. "The order of the Court, therefore, made at the *next* term, directing that the bill of exceptions be filed in the cause as of the date of the trial" (as of a previous day and term), "*was a nullity.* For this reason upon the case as it is presented to us, the bill of exceptions, though returned here, cannot be considered as part of the record."

That—

3. The writ of error and the citation in this case were made returnable more than thirty days from the day of signing the citation, and at different days and neither the writ nor the citation were annexed to and returned with the record (Record, 3, 5)—we do not care to discuss, because we suppose that the Court would, under R. S., sec. 954, permit such defects to be amended.

We come now to the gravest error made in trying to get up here, alone an abundant ground of dismissal of the writ and affirmance of the judgment herein.

4. No assignment of errors was filed with the clerk of

the Court below with the petition for the writ of error. (Record, 26, 116.)

Rule 11 of this court provides:

"Rule 11. Assignment of Errors.—The plaintiff in error or appellant *shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors* which shall set out separately and particularly each error asserted and intended to be urged. *No writ of error* or appeal *shall be allowed* until such assignment of errors *shall have been filed.* * * *"

The petition for writ of error was filed April 17, 1901 (Record, 26), while the so-called assignment of errors was not filed until May 7, 1901 (Record, 116), twenty days after the filing of the petition.

Counsel for plaintiff in error seems to have been aware that this writ of error was issued contrary to law, and was consequently void, and that their bill of exceptions, assignment of errors, and bond were not filed at the proper time. (Record, 31.)

What says a late decision of the Circuit Court of Appeals of the Eighth Circuit, April 13, 1901?

"Assignment of Errors—Filing Before Issue of Writ Indispensable.—The filing of an assignment of errors before the issue of a writ of error is indispensable under the eleventh rule of the Circuit Courts of Appeals [our rule already cited], and the writ will be dismissed if the assignment is not filed before it issues [Syllabus by the Court].

* * * * * * * * *

"A motion has been made to dismiss the writ of error in this case because the assignment of errors was not filed until after the writ was issued. Section 997 of the Revised Statutes makes an assignment of errors, a prayer for reversal, and a citation to the adverse party essential parts of the record upon which a review of the rulings of a trial court may be invoked in the appellate courts of the United States. Rule 11 of this Court provides that 'the plaintiff in error or appellant shall file with the clerk of the court below, *with* his petition for the writ of error or appeal, *an assignment of errors* which shall set out separately and particularly each error asserted and intended to be urged. *No writ of error or appeal shall be allowed* until such assignment of errors shall have been filed.' [Word for word our C. C. A. rule.]

"This is a just and reasonable rule. It makes the filing of the assignment of errors before the writ is allowed indispensable to its issue, to the end that the Judge to whom application is made for its allowance may be informed what the alleged errors are upon which the petitioner relies, and may thus intelligently decide whether or not the prayer of his petition should be granted, and also to the end that the opposing counsel and the appellate court may be informed what questions of law are raised for consideration. In the early history of this court attention was sharply called to this rule, and the announcement was clearly made that it would be enforced, although in the early cases in which its enforcement was invoked we carefully examined the errors assigned in order that no injustice might result from the application of the rule.

U. S. v. Goodrich, 4 C. C. A. 160, 54 Fed. 21, 22.
Union Pacific R. Co. v. Col. Eastern R. Co., 4 C. C. A. 161, 54 Fed. 22.
City of Lincoln v. Sun Vapor St. Light Co., 8 C. C. A. 253, 59 Fed. 756, 759.

"The writ of error in this case was filed on August 18, 1900, and no assignment of errors was presented with the petition, and none was filed until August 20, 1900, *two days* after the issue of the writ. An affidavit has been presented in explanation of the failure to present the assignment of errors before the writ was issued, but it presents no sufficient excuse for a failure to comply with the rule. The motion to dismiss the writ is granted.

Flahrity v. R. R. Co., 6 C. C. A. 167, 56 Fed. 908.
Crabtree v. McCurtain, 10 C. C. A. 86, 61 Fed. 808.
Lloyd v. Chapman, 35 C. C. A. 474, 93 Fed. 599, 601.
Ins. Co. v. Conoley, 11 C. C. A. 116, 63 Fed. 180.
Great Creek Coal Co. v. F. L. & T. Co., 63 Fed. 891.
Van Gunden v. Iron Co., 3 C. C. A. 294, 52 Fed. 838.
Ry. Co. v. Reeder, 22 C. C. A. 314, 76 Fed. 550."
Frame v. Portland Gold Mining Co. (C. C. A.), 108 Fed. 750.

In Ins. Co. v. Conoley, supra, additional time within which to file assignment of errors had been granted, which makes it all the stronger in our favor. This Court has dismissed a case for want of an assignment of errors.

Parker v. Dunning, opin. May 23, 1898, No. 528.

What's the difference between an assignment of errors that cannot be considered and no assignment? We could

cite other cases to same effect; but what is the use? Haven't we proved our point, and must not this writ be dismissed and the judgment of the Court below herein affirmed?

Our next motion, to affirm with damages, is in accordance with the rule and practice of the Supreme Court (Rule 6, par. 5) adopted by rule 8 of this Court, uniting with a motion to dismiss a writ of error or an appeal a motion to affirm. In one case there was no proper bill of exceptions. The Supreme Court affirmed the judgment with damages at the rate of ten per cent.

Sire v. Air-Brake Co., 137 U. S. 579.

"We have jurisdiction of this case. The motion to dismiss is therefore denied, but * * * the motion to affirm is granted."

Swope v. Leffingwell, 105 U. S. 3.

"Our jurisdiction of this case is clear. The motion to dismiss is therefore denied, but we think the motion to affirm should be granted."

Hinckley v. Morton, 103 U. S. 764.

"There is sufficient color on the motion to dismiss to warrant us in entertaining the motion to affirm. Judgment affirmed."

The Alaska, 103 U. S. 201.
Evans v. Brown, 109 U. S. 180.
The Tryon Case, 105 U. S. 267.
Micas v. Williams, 104 U. S. 556.
Chanute City v. Trader, 132 U. S. 210.
Sugg v. Thornton, 132 U. S. 524.

The grounds of our next motion, to vacate the order of the Judge of the lower court staying execution of the judgment herein and the so-called supersedeas bond herein have been already stated.

The so-called supersedeas bond was given on the 12th day of April, 1901, and filed April 17, 1901. (Record, 30.) The petition for the writ of error and the order allowing the writ and staying execution were dated April 13, 1901, and filed April 17, 1901. (Record, 25, 26.) The writ of error was dated April 15, 1901, and filed in the court below April 17, 1901. (Record, 2, 3.) The citation on writ of error was dated May 13, 1901, and filed in the lower court May 20, 1901. (Record, 4, 5.)

So, then, this bond *on writ of error* was given three days before the writ was issued and five days before it was filed, and a month before the citation was signed. The statute requires the Justice or Judge signing the citation on any writ of error to take the bond at the same time. (R. S., sec. 1000.) How can this bond then operate as a supersedeas, and if the bond falls, does not the order conditioned upon it fall also?

"A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with," citing cases.

Sage v. R. R. Co., 93 U. S. 412.

What says another section of the law?

"But if he [defendant] desires to stay process on the judgment, he may, *having served his writ of error,* as aforesaid, give the security required by law, etc."

R. S., sec. 1007.

The writ of error was not served (by filing) in this case until April 17, 1901 (Record, 3), although the bond was given April 12, 1901. (Record, 29, 30.)

"If a supersedeas is asked for when the writ is obtained, the writ must be sued out and served * * * *and the required bond executed when the citation is signed.* * * *"*

Kitchen v. Randolph, 93 U. S. 86.

"Its [the writ's] issuance must, *of course,* precede the execution of the bond. * * * "

Telegraph Co. v. Eyser, 19 Wall. 419.

A justice of the Supreme Court allowed a supersedeas, "evidently supposing that a writ of error had actually been issued." It was afterwards made to appear to the Supreme Court that no writ of error had issued. The Supreme Court thereupon denied a motion to vacate the so-called supersedeas, as follows:

"As no writ of error has ever been issued, that [supersedeas] order has no legal effect. A supersedeas cannot be allowed except as an *incident* to an appeal actually taken, or a *writ of error actually sued out.* We, however, are as much without jurisdiction to vacate the order of the justice as he was without jurisdiction to grant it. Consequently, the motion to vacate must be denied, although *the order, as it stands, is of no validity.*"

Ex parte Ralston et al., 119 U. S. 613.

In another case the Supreme Court denied a motion to vacate a supersedeas as "*unnecessary*" where the writ of error was not sued out or served within the time required

by the statute in order that the bond operate as a supersedeas.

Western Air-Line Const. Co. v. McGillis, 127 U. S. 776.

As no writ had been issued when the so-called supersedeas bond herein was given, the said bond was a nullity, and the writ of error afterwards sued out did not operate to stay execution upon the judgment herein. Although, perhaps, *unnecessary,* we hope this Court will declare that the said bond does not and cannot operate to stay execution of our judgment herein.

If we are entitled to an execution of our judgment *forthwith,* let us have it. There is nothing mean in a suitor's asking for all that he is entitled to.

ON THE MERITS.

The first twelve pages of the brief of plaintiff in error are devoted entirely to what they claim to be a statement of the case taken from the pleadings and evidence, but as they have simply taken excerpts from the complaint and evidence which are most favorable to their contention, we deem it wise to here state some of the facts proven and allegations relied upon by defendants in error. It will be seen from the brief of plaintiff in error that the only errors relied upon or presented are those contained in their fifth, sixth and seventh assignments:

1st. Was H. B. Pope vice-principal or a fellow-servant?

2d. Was the deceased guilty of contributory negligence?

3d. Were these propositions fairly submitted to the jury under the instructions of the Court?

For it is conceded that if from the facts proven H. B. Pope was not in law a fellow-servant, or deceased was not as a matter of law guilty of legal neglect, then the judgment should be affirmed.

Now let us see if Pope was not a vice-principal, bearing in mind that the Seven Hundred Mine, where deceased lost his life, is a separate and distinct department of the company's working. The mine furnished all of the ore for the Seven Hundred Mill, which is situate on the beach a long distance from the mine, to which the ore is conducted by means of a tramway. Now the mine where deceased lost his life consists of tunnels, shafts, "Glory Hole," stopes, hoists, elevators, machine shops, blacksmith shop, power plant, air pipes, and etc.

Now we contend, and it is conceded, that this entire branch or department in all its details was under the complete, exclusive, and entire control and immediate supervision and management of Pope, under powers delegated to him by the master—and who exercised all of the functions of the master in relation thereto—and this we contend under the law constitutes him a vice-principal and not a fellow-servant.

Now let us examine the evidence on this point.

1st. Take the evidence of defendant in error (Record, at the top of page 37); he says, speaking of the working in the mine:

"Well, they got a man looking after each gang; he is called shop boss or shift boss or pit boss or so. Those working in the shops, or working in the mines are working under bosses. There is a general foreman or supervisor

of all of those forces. His name on that occasion was H. B. Pope. Mr. Pope was the man that directs everybody and told them what to do, and ruled the whole thing, and sent a gang there and another here or so. He both employed and discharged men."

The next witness called was Nels Olin. (See his testimony at the foot of page 41, Record.) He says:

"I am acquainted with H. B. Pope. He was foreman of the mine. No other person, as far as I know, other than H. B. Pope directed the labor or acted as foreman of that department of the company's work." And again at the bottom of page 42 and page 43 he says: "The men employed in the mine were working in different groups. There was a pit and two stopes and then a shaft and blacksmith shop, and hoist and tramway—four gangs. Well, some was working in the stopes drilling, some was blasting and some breaking rock, and they had a shift boss over them to look what they were doing."

"Q. I'll ask you to state to the jury if you know whether or not there was a general foreman or superintendent over them. A. Yes, sir.

Q. Who was that?

A. Mr. Pope was the foreman.

Q. H. B. Pope? A. Yes, sir."

The next witness called was Guy Falkner. (See his evidence, commencing at the foot of page 43, Record.) He says: "I was helping Mr. Pope part of the day. He was foreman of the Seven Hundred Mine. As such foreman his duties were to advise the men, show what they were to do and tell them where to work. It furnishes all the ore for the Seven Hundred Stamp Mill. That

mine was under Mr. Pope's supervision at that time." Also at the bottom of page 44, he says: "I know that Mr. Pope had supervision of that property, because he instructed the men and hired them and discharged them too. I am sure he hired and discharged them."

And again, commencing at the bottom of page 47, Record, he says: "When I said Mr. Pope had charge of the work. right there, I meant the Seven Hundred Mine, and the *entire mine. Mr. Pope did not work generally in any department around the mine.*"

The next witness called was Thomas Tatum. (Page 48, Record.) He says that he was blacksmith at the mine, that Pope was his superior and directed him, and that he (Pope) had general superintendency of the operations of the mine.

And at the top of page 50 he says: "The men employed in the various departments of the Seven Hundred Mine, such as blacksmiths, engineers, miners and drill-men were under Mr. Pope's immediate supervision as I understood it."

The above were all of the witnesses called on behalf of the plaintiff below in the opening of his case. The three witnesses called on behalf of plaintiff in error on the trial all testified that Pope had general supervision of the mine and controlled their entire department. Their first witness, Mr. A. C. Weck, said he was a general superintendent of the company's mines in Alaska, which consisted of the Ready Bullion Mine, Ready Bullion Mill, the Seven Hundred Mine, and the Seven Hundred Mill (at the top of page 69, Record). He testified that he knew Mr. Pope and that he was employed on the Seven Hundred

Mine; at that *time* he was *foreman* of *the mine* at the Seven Hundred foot claim. Then on 72, Record, he says: "The engine, an engineer, the blacksmith shop and blacksmith, and so on. And all of these people are under the immediate supervision of the *foreman* and *that foreman was Mr. Pope.*" Then he says: "I couldn't state where Pope is now. He is not at the mines, nor in Alaska. He left Alaska on the 20th of January [1900], I think, after this suit was brought against the company. The general office of the company is on Douglas Island at the store up by the Treadwell mine. That's where the men report. My office is there. I haven't any particular office at the Ready Bullion or the Seven Hundred. The whole of these mines at Treadwell, the Ready Bullion, the Mexican, the Seven Hundred, the Treadwell, and all the rest of them, *office* from the same general point, the store. And these people when discharged reported there from all these places. The foreman in this mine orders the miners' supplies—the small supplies he needs temporarily. And if there is a temporary break in the machinery, and he has the time and it is not too extensive, it's his duty to repair it, or see that it is repaired. If it's extensive he reports it to me. All small breaks the men look after themselves."

The only other witnesses called for the plaintiff in error on the trial of the case were James Pianfetti and Robert Muster, both of whom testified that Pope as foreman had full charge and control of the Seven Hundred Mine. In fact, it was admitted on the trial that such was his authority.

Now with these facts before us, let us see if under the authorities cited by counsel for plaintiff in error Mr. Pope was not a vice-principal and not a fellow-servant. Take the case upon which they most rely, viz., Alaska Treadwell Gold Mining Co. v. Whelan, 168 U. S. 86.

First, let us examine the history of this case. It will be seen that this case was taken from the Alaska Court to this Court by writ of error and by this Court affirmed in a very able opinion by Judge Hawley. Mr. J. F. Malony, who was then attorney for the respondent, immediately thereafter became attorney for plaintiff in error. After the affirmance by this Court, the records show that the judgment was paid and satisfied in full by the company. Notwithstanding, however, the case was taken from this Court to the Supreme Court of the United States by some means, and there, as we are advised, upon an ex parte hearing this decision was rendered, notwithstanding the Supreme Court was without jurisdiction, for the very apparent reason that the amount involved was but $2,500. Be that as it may, however, we are entirely within the rule laid down in that case. It will be seen that "Finley" referred to in that case was simply a shift boss having charge of a night shift, or boss of one of the various gangs described in the evidence in this case, and did not have supervision of the entire branch or department, as did Pope.

Counsel in his brief says it was Finley's duty to give notice—to notify the men when the rock was to be drawn from the chute, etc. Now it is clear from the evidence in the case at bar that Pope had no such duties to perform. Witnesses say that he did not work generally in

any of the departments of the mine. He had such bosses as Finley was under him who looked after those matters. He (Pope) was the supervisor over all. We say, therefore, that Pope was not a fellow-servant under the authority of the Whelan case.

Counsel next cites the case of Keegan v. Ry. Co., 160 U. S. 259. (This is what we commonly call a railroad case.) As is well known, that branch of the law has become a "rule unto itself" and would hardly be considered authority in cases of this kind, yet an examination of that case shows that we would be entirely within the rule there laid down. It is said in the New Jersey case cited by counsel: "It is the necessary consequence that the mere execution of the planned work must be intrusted to the workmen, and where necessary to groups or gangs of workmen, and in such case that one should be selected as the leader, boss, or foreman."

Now that is exactly what Pope was doing. He was the supervisor. He *planned the work, and* detailed those various groups or gangs of men under foremen or bosses to go and do that work. Pianfetti in charge of the gang of which Hegman, who lost his life, was one, was one of those bosses. So was Finley in the Whelan case, but Pope was there as the *master who planned the entire work of that department,* and had complete supervision over all those gangs, both the day shifts and the night shifts, in this department of the company's works.

Counsel further says, in support of his contention, that Pope was doing a piece of work (when he so negligently shut the air off) which might have been done by any other laborer, and in doing so he was not acting as foreman but

acting as Pope, working at the time as an ordinary laborer. How puerile such argument is! Suppose the master himself had as carelessly cut the air off and killed this man, could it be said that in doing so, for the time being, he was not master, but an ordinary laborer? We think not.

The same may be said of the only other two cases cited by counsel. In fact, we venture to say that there is not a case recorded wherein this man Pope under the evidence would not be held to be a vice-principal. The doctrine of master and servant and that of the duty to the servant by the master has been the subject of much discussion from the time that our American jurisprudence was established on this continent up to the decision of the Ross case by Justice Field of the United States Supreme Court in 1884, at which time the doctrine of master and servant and fellow-servant, and the exemption of the employer from liability by reason of the conduct of those in his employ, both in this country and in England, was a very much mixed and unreconciled question. No two States had agreed upon the rule, and the State and federal courts were at variance as to the true doctrine. But with the promulgation of the rule laid down in the Ross case, the whole country, both here and abroad, has seemed to conform to it, so that now the United States Supreme Court, all the federal courts, and most of the State courts have agreed upon and adhere to that rule, so that it may well be said that all the decisions affecting the rights and duties of employees to their employers and of the employers to their employees, so far as the judicial determination of the question is concerned, flow in the same channel. And the rule is well settled and understood as it is de-

clared in the case of the R. Co. v. Ross, reported in the 112 U. S. 377, 391. The fact is, that a corporation can act only through its superintending officers, and the neglect of those officers with respect to their servants is a neglect of the corporation. This rule is applicable to all employers, but applies with special force to corporations. And as most all business at this time is conducted and operated by corporations, this is undoubtedly the reason which led the learned Judge to remark that: "In the progress of society and the general substitution of the ideal and invisible masters and employers for the actual and visible ones of former times, in the form of corporations engaged in varied, detached, and widespread operations, as in the construction and working of long lines of railroad, as well as in operating mines and other enterprises, it has been seen and felt that the universal application of the rule exempting employers from liability for the carelessness and negligence of their employees who exercise control and supervision over employees of the same class, who are subject to their direction, resulted in hardship and injustice." And so we find the later rule is clear and definite and is followed by subsequent law-writers on the question, as well as by the decisions of the Supreme Court of the United States and the Supreme Courts of the various States of the Union and of the federal courts, which is apparent from an examination of those authorities. In support thereof we would call attention to the eminent and well-recognized authority of

Shearman and Redfield on Negligence,

the latest authority on that subject, whose utterances are

supported by the decisions of the Supreme Court, federal courts and most all of the State courts.

This rule, by reason of its complete adoption in this country, is commonly called the American rule, and is as follows:

"A servant who is intrusted with the management of the master's business or in superintending the operations of that business, and is invested by the master with command and control over other servants of that business or any of its departments, is *not a fellow-servant* with those who are employed under him and subject to his orders, and it makes no difference whether he may be called foreman, overseer, middleman, or boss."

This line of decisions is uniform from the Ross case down to the present time, and Messrs. Shearman and Redfield, in their work on Negligence, say of the rule as follows:

"American Rule—Servant in Common, not Fellow-servant With Others.—Under the rule as declared in Ohio, and since followed by the courts of last resort in Connecticut, West Virginia, Kentucky, Tennessee, Missouri, Illinois, Nebraska, Louisiana, North Carolina, Georgia, Kansas, Texas, Washington, Oregon, Montana, and California, the servant who is intrusted with the general management of the master's business, or with any separate portion of that business, and is vested by the master with command and control over other servants engaged in that business or department, is not a fellow-servant with those who are employed under him and subject to his orders. He acts as the master's substitute, and when the master chooses

to delegate his power of control and management to another person, it is held by those courts that he is liable for the negligence of such representative, while acting as such, to the same extent as if it were his own order, whether the party to whom the power is delegated be designated as foreman, boss, or middleman. This principle has been adopted by the Supreme Court of the United States and we therefore call it the American doctrine. And the liability of the master is not confined strictly to negligence of such a manager in giving orders, but extends also to his negligence in management of any kind."

The master, therefore, under this rule, as sustained and supported by authorities hereafter cited, is not only liable as aforesaid for his foreman or the servants in charge of other employees who are authorized to direct their movements, but is bound, under the law, to furnish his servants with a safe place to work, and with safe and reliable implements to work with, and any direction by the foreman to said servants to work in an unsafe place or with unsafe appliances binds the master in the event of injury occurring to them. There is no way the master can devest himself of this obligation to his employees. He is bound by the conduct of his foreman or boss, he is further bound to furnish them with a safe place to work, safe appliances to work with, and in this regard his foreman or boss stands in his shoes, and the neglect of such person is the neglect of the master.

The master is also bound to employ such men, either as fellow-servants or foreman who possess ordinary skill and exercise careful management, and, if he fails so to

do, an injured employee has a right, under the law, to demand from him just compensation for his injuries.

In support of these conclusions we desire to call the Court's attention to:

Shearman and Redfield on Negligence, secs. 224, 226, 228, and the decision of Justice Field of the Supreme Court of the United States, reported in the 112 U. S. 277.

Bailey on Personal Injuries Relating to Master and Servant, secs. 1833, 1837, 1839, 1841, 1842, 1855, 1857, 1865, 2025, 2033, 2111, 2113, 2114, 2195, 2227, 2360, 2428, 2460.

Thompson on Negligence, vol. 2, pp. 946, 948, 971, and 979.

The Ross case has been somewhat modified by the Baugh case (149 U. S. 368), and later cases, but rather in regard to the *reason* of the rule announced therein, than in regard to the rule itself. Judge Jenkins, only last April, sums up the present state of the law on this subject, thus:

"We have held in Reed v. Stockmeyer, 20 C. C. A. 381, that it is the duty of the master to use ordinary care to furnish appliances reasonably safe for the use of servants —such as, with reasonable care on their part, can be used without danger save such as is incident to the business in which such instrumentalities are employed; that it is also the duty of the master to use like care to provide a safe place in which the laborer may perform his work, and keep it in a suitable condition. These duties may not be foregone, and, when delegated to be performed by another, that other is a vice-principal and quoad hoc rep-

resents the principal, so that his act is the act of the principal. That other may have a dual character—vice-principal with respect to the duty due from the master to the servant and coservant with respect to his acts as a workman. In case of injury, the question of the liability of the master turns rather on the character of the act than on the relations of the servants to each other. If the act is in the discharge of some positive duty owing by the master to the servant, then *negligence therein* is the *negligence of the master;* otherwise there should be personal wrong on the part of the master to render him liable. These principles we understand to be established by the ruling of the ultimate tribunal.

R. R. Co. v. Baugh, 149 U. S. 368.
R. R. Co. v. Keegan, 160 U. S. 259.
R. R. Co. v. Charless, 162 U. S. 359.
R. R. Co. v. Conroy, 175 U. S. 323."
Lafayette Bridge Co. v. Olsen, C. C. A., 7th Cir., April 30, 1901, 108 Fed. 335.

Principals were held liable to workmen for negligence of those put in charge of dangerous materials, structures, and appliances, and no good reason is now made to appear for summarily disturbing the verdict in the following cases:

Beattie v. Edgemoor Bridge Works, 109 Fed. 233.
Mather v. Rillston, 156 U. S. 391.
Railway Co. v. Archibald, 170 U. S. 665.
Hyde Co. v. Kennedy, 40 C. C. A. 69.

Now as to the second proposition. Was Hegman guilty of contributory negligence? That is to say, was he guilty

of such negligence as would authorize the Court to say, as a matter of law, his conduct was such as amounted to legal negligence? There is no rule of law better settled than that contributory negligence as a defense is a question of fact exclusively for the jury, under proper instructions from the Court, and we undertake to say that the instruction complained of in plaintiff in error's seventh assignment of error is not only a proper instruction in this case, but it stretches the law to its very verge in favor of the plaintiff in error. (See 7th assignment, beginning at the bottom of page 97, Record.) After plaintiff below had rested his case, defendant below attempted to show that deceased was negligent by asking two of their witnesses about a certain chain ladder which was about the mine. Mr. Weck simply said that they had chain ladders to be used about the mine in sinking shafts. The only witness whose testimony was in any way material, and upon which the plaintiff in error here relies to show contributory negligence, is that of the gentleman who says he is from Italy and his name is Pianfetti, and whose testimony in relation thereto is in every respect contradicted by the three witnesses called by defendant in error in rebuttal.

Let us see now what Pianfetti says about this ladder. Beginning at the top of page 74, Record, he says: "I was boss over them, for that reason Pope told me to put it down on the morning of the 9th (accident occurred at 11 o'clock A. M. of the 9th).

Q. Didn't Mr. Pope ask you what was the reason the chain ladder wasn't put down before?

A. Before the last blast was going to be, yes, and put the chain ladder down in time. He said, 'Put it down.'

Q. Mr. Pope told you to do it that way, didn't he?

A. Mr. Pope told me to put it down.

Q. Didn't Mr. Pope tell you about eight o'clock that the chain ladder was ready and to put it down at noon?

A. Yes, sir.

Q. Now Mr. Pianfetti—

A. No, sir; he didn't tell me to put it down at noon—

Q. Air was the motive power of that shaft, wasn't it?

A. Yes, sir.

Q. If the bucket was running at all that was a good, safe place to work, wasn't it? A. Yes, sir.

Q. Had you ever had a chain ladder there before that?

A. Not since we were there.

Q. Isn't it a fact that the ladder was broken, and wasn't in a fit condition to be put down at all until that morning?

A. There was a whole one to put down.

Q. Down in the blacksmith shop being fixed, wasn't it?

A. Yes, sir. Pope gave me the instructions to put it down. He had authority to give those instructions. I don't know if Muset and Hegman were in the mine when these instructions were given; they wasn't around there—didn't see them anyway. I can't tell where I first saw them after I had this conversation with Pope. I didn't see them before getting down to the shaft. I think I first saw them when I got down in the shaft. I went down there as soon as Pope told me about it. They were getting ready to blast, shoveling a few buckets of rock, and so.

Q. And then you told them about the ladder business as soon as the blast was over?

A. We had been talking about that over before—

Q. Well, answer my question. You told them as soon as the blast was over you would put up some timbers and then put the ladder down?

A. We noticed that before.

Q. You didn't tell them that then at the time.

A. *I did not.*

Q. You told them nothing about the chain ladder at that time? A. *No.*

Q. *Nothing all that forenoon?*

A. I told them—

Q. After the man was dead you told them—that is it?

A. No, before.

Q. Did Pope ever tell Muset or Hegman about that ladder in your presence?

A. No; *I ain't, was there,* but he told them. They have got a blacksmith working at the mine; and a hoist, a shaft, and another shaft called the 'Glory Hole'; and a tramway and various other things; and different men in charge of these various things, and they were all under Mr. Pope."

The above is substantially all the evidence offered by the plaintiff in error in the trial of the cause, in the lower Court, from which counsel say: "It 'conclusively' appears that deceased was guilty of contributory negligence to the extent that the Court should have taken the case from the jury."

The record shows that even this is contradicted in every material part by the witnesses called in rebuttal.

Witness Olin at the bottom of page 82, Record, says all of these conversations spoken of by Pianfetti were to the effect that they had been promised a ladder, and the

ladder would be put down as soon as it was finished. And these were had just shortly before the accident. Muset, being called in rebuttal, says on page 83, Record: "This was the day before the accident happened. Jim said we will blast this out and put in a set of timbers and then take down the chain ladder, and that nothing was said about the ladder prior to that that he knew of." (It will be remembered that Muset was working on the same shaft with deceased at the time and prior to the accident.)

The next witness in rebuttal was Guy Falkner, on pages 84 and 85, Record, he says, speaking of the chain ladder:

"Q. You have been sworn before. State whether you were working in the blacksmith shop of the Seven Hundred on October 9th, 1900? A. Yes, sir.

Q. Were you working in the shop on that morning?

A. Yes, sir.

Q. State whether you saw a chain ladder there.

A. Yes, sir.

Q. State whether you had heard any conversation with Pope, the foreman, and the shift boss, Pianfetti, in relation to that ladder. A. Yes, sir.

Q. What was that conversation?

A. Mr. Pope told him the ladder was ready and to take it down at noon.

Q. What time of day was that?

A. Somewhere about eight o'clock in the morning.

Q. And the chain ladder, at that time, where was it?

A. In the shop.

Q. The accident occurred just a while before noon?

A. Yes, sir.

Q. State whether or not that chain ladder remained in the shop during the forenoon previous to the accident.

A. Yes, sir.

Q. Where was it lying?

A. Right near the door.

Q. State whether or not Mr. Pope was down during the day.

A. Yes, sir; he was in there during the day.

Q. Was the ladder in a position where he could have seen it from where he was? A. Yes, sir."

We certainly think that this testimony conclusively shows that there was no contributory negligence on the part of the deceased so far as the ladder is concerned. At all events if the evidence offered by plaintiff in error was of sufficient weight to require rebuttal at all, the evidence offered for that purpose was sufficient to raise an issue for the jury under the Court's instructions on this point. The evidence shows that the ladder (if a ladder was necessary—the evidence shows it was not) was not furnished for use until after the accident.

We think that the evidence conclusively shows that the plaintiff was not guilty of contributory negligence, at least not such negligence as would defeat his right of action. The witness Pianfetti testified (see Printed Record, page 74) that Pope gave the instructions to put the ladder down to him, as he was the boss of the gang that were at work in that shaft, and that neither Hegman, the deceased, nor Muset were there at the time. Whether or not Pianfetti was negligent in not putting the ladder down in accordance with the instructions of Pope is immaterial, as the rule of law is well settled both by the

state and federal courts that contributory negligence to defeat a right of action must be the negligence of the person injured, and that it is immaterial whether the negligence of a fellow laborer also contributed to the injury, so long as the master was also negligent and the negligence of the master contributed to the injury.

And while there was a strong conflict in the evidence in regard to the negligence of the deceased, in which case the verdict of the jury must be conclusive, we contend that even if it was through the negligence of the deceased that the ladder was not put down that fact would not bar the right of action. It is well established that the negligence of the plaintiff or the person injured in order to defeat the right of action must proximately and not remotely contribute to the injury. And it is not a proximate cause of the injury when the negligence of the person inflicting it is a more immediate efficient cause. "In jure non remota causa sed proxima spectatur." That is when the negligence of the person inflicting the injury is subsequent to, and independent of, the carelessness of the person injured, and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to have avoided its effects, and prevented injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation. In such a case, the want of ordinary care on the part of the injured person is held not a judicial cause of his injury, but only a condition of its occurrence.

4 Am. & Eng. Enc. of Law, 25, 26, and 27, and cases there cited.

2 Thompson on Negligence, 1151 and 1157, where the leading English and American cases on this subject are cited and discussed.

Davies v. Mann, 2 Thompson on Negligence, 1105.

Radley v. The London etc. Co., 2 Thompson on Negligence, 1108.

Richmond etc. Railroad Co. v. Anderson, 31 Am. Rep. 750.

Kerwhacker v. Cleveland etc. R. R. Co., 62 Am. Dec. 246.

Zemp v. Wilmington etc. R. R. Co., 64 Am. Dec. 763.

Isbell v. New York etc. R. R. Co., 71 Am. Dec. 78.

Brown v. Hannibal etc. R. R. Co., 11 Am. Rep. 420.

We do not think that it will be seriously contended in this case that Mr. Pope would not have known that there was no ladder in the shaft had he exercised ordinary care or any care at all. On the morning of the day of the accident Pope told Pianfetti to take the ladder down at *noon*—the accident occurred just before noon. (See testimony of Guy Falconer, Printed Record, pages 84 and 85.) Just before the accident Pope was down in that very shaft, and as he came from there he told Muset to take down the hot iron as the boys were ready to blast. Shortly after that and just before the blasts were fired, Pope shut off the air and deprived those in the bottom of the shaft from what he must have known to be their only means of escape. (Record, 37, 38, 39.)

We think, therefore, that the trial court committed no

error in submitting the question of contributory negligence to the jury. First, because there was a conflict in the evidence; and secondly, because, even though all that counsel contends for in the evidence were true, there would have been no contributory negligence on the part of the deceased, the failure to put down the ladder being the remote and not the proximate cause of the injury, if it contributed at all, and the company having had ample opportunity, by the exercise of ordinary care, to ascertain that there was no ladder in the shaft before the air was disconnected.

The Court's ruling upon defendant's special answer in the nature of a plea in abatement was unquestionably sound. The appointment of plaintiff as administrator of the deceased seems to have been in accordance with the provisions of the Alaska Code in that regard. (Title II, chapters 79 and 81.) Besides, all court proceedings are entitled to all presumptions in favor of their validity.

The allegations of negligence found in the complaint are broad enough to justify the Judge's charge, and the evidence in the record is abundantly sufficient to sustain the verdict of the jury herein. Counsel complains of particular portions of certain instructions; but *take the entire charge,* as contained in the record (Record, 88), and what objection could be taken to it? Absolutely none, under counsel's own contention.

We respectfully submit that the judgment of the Court below should be affirmed with damages and costs.

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Counsel for Defendant in Error.